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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958

No. 642

ELEANORE M. LOEB, *Petitioner*

v.

WILLIAM LOEB, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK JOINTLY WITH OR IN THE ALTERNATIVE TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the Court of Appeals of the State of New York, the highest court of that State, entered October 16, 1958, denying motion for reargument and reconsideration of its decision rendered on June 25, 1958 affirming the judgment of the Supreme Court of the State of New York, County of New York dismissing the Complaint; on

which decision remittitur was filed in the Supreme Court in the County of New York on July 29, 1958 and judgment entered thereon.

OPINIONS BELOW

Court of Appeals of the State of New York, 4 N.Y. 2d, 542 (Appendix A-1-11).

Appellate Division of the Supreme Court of the State of New York, First Judicial Department in the County of New York. No Opinion. Order certifying that a question of law is involved which ought to be reviewed by the Court of Appeals. Record on Appeal pp. 98-99; Appendix A-11—A-12).

Supreme Court of the State of New York, County of New York, 3 Misc. 2d, 622 (Record on Appeal, pp. 87-90; Appendix A-12—A-16).

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS FOR REVIEW

Whether the Court of Appeals of the State of New York deprived petitioner of her rights under:

Section 2 of Article IV of the Constitution of the United States—and

Section 1 of Amendment XIV to the Constitution of the United States,

in determining and deciding that the provisions of Section 1170-b of the New York Civil Practice Act were intended to afford relief and apply only to a

limited group or class of persons, whose requirements of status the Court describes and which group it designates as "New York wives" though no such classification or designation is in the statute;

And not to a spouse who was at no time during the course of her marriage a "New York wife";

And in further deciding petitioner "may in no sense be regarded as a "New York wife", thereby depriving petitioner of relief under Section 1170-b of the New York Civil Practice Act in this erroneous construction of said Section; and in disregarding evidence that New York had sufficient "contacts" with this marriage to permit jurisdiction of the suit—in that petitioner moved to New York by agreement with her husband and at his request.

Section 2 of Article IV of the Constitution of the United States—reads in part as follows:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Section 1 of the Amendment XIV to the Constitution of the United States—reading in part as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside"—

and the further provision that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any per-

son within its jurisdiction the equal protection of the laws."

2. Was the interpretation of the Civil Practice Act, Sec. 1170-b, by the Courts below, discriminatory, and as applied below, has petitioner been denied equal protection of the laws by the fact that this interpretation limited relief under Section 1170-b to a class of persons designated by the Court, but not the Statute, as "New York wives"; thereby excluding petitioner from the class or group arbitrarily created by the Court for protection under Section 1170-b and setting up unequal and discriminating administration of a statute unambiguous, fair and legal on its face, in violation of the provisions of Section 1 of Amendment XIV to the Constitution of the United States providing that "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside," and the further provisions that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * * or deny to any person within its jurisdiction the equal protection of the laws."

3. Whether the New York Court of Appeals in deciding that petitioner was not entitled to relief under Section 1170-b of the Civil Practice Act of New York, thereby denying her rights guaranteed under the Constitution of the United States, has decided a federal question of substantial importance and probably not in accord with applicable decisions of this Court and especially the decision in the *Vanderbilt* case (354 U.S. 416, 1957.).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 2 of the Constitution of the United States which reads in part:

> "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Amendment XIV, Section 1, which reads in part:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside",

and the further provisions that:

> "No State shall make or enforce any law which shall abridge the Privileges or Immunities of Citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York Civil Practice Act, Sections 1170-b, 1165-a (1-3) and 1166 (Appendix A-22—A-23).

STATEMENT

This action for separation or divorce and for relief under Section 1170-b of the Civil Practice Act of New York was commenced by the respondent's wife by sequestration of the property of the defendant in New York. Thereafter, defendant appeared generally and answered the complaint and set up as a bar to the action his jurisdictional objections on certain proceedings between the parties in the State of Vermont.

The parties were married in Connecticut in September 1942. Both, at the time, were residents of New York, and had been since birth. Plaintiff was twenty-four years of age, defendant thirty-four. This was plaintiff's first marriage; defendant's second.

About the time of the marriage, defendant moved to Vermont and established himself in the newspaper business; plaintiff continued to reside in New York until 1944 when she gave up work which she was doing and joined her husband in Vermont, which State continued to be their matrimonial domicile until the defendant deserted and abandoned his wife and home in 1951. He went to live in New Hampshire for a period of months, then secretly went to Nevada in April 1952; obtained an exparte divorce in that State on July 11, 1952 and four days later remarried there.

The issue of the marriage was one daughter, Penelope, born in October 1948.

During the period when the marriage appeared doomed, defendant requested his wife, the plaintiff, to go to live near his mother so that she could see Penelope frequently. The mother lived in Oyster Bay, Long Island. Said request by the defendant is evidenced in his own writing in his letter of April 6, 1951 to his mother as follows:

> "So Eleanore and I have talked things over and she has agreed at all times to live within 30 miles of you so you can readily see Penny at any time you feel like it. As a matter of fact I think she would be perfectly willing to live with you at Oyster Bay if you wanted her" [Record on Appeal, p. 81]

In accordance with her husband's request, as soon as possible after she had been deserted, plaintiff moved

to Oyster Bay, Long Island, and maintained residence for about two years with defendant's mother. Plaintiff then moved to Amenia, New York. At the time this action was instituted, plaintiff lived in Oyster Bay. When the action was tried, plaintiff lived in Amenia, New York. From the time the plaintiff, at defendant's request, moved into the home of defendant's mother, plaintiff has lived continuously in the State of New York.

Since January 1952 defendant has contributed not one cent to the support of the plaintiff. Defendant is a man of wealth and commands a high income, his last reported salary being $50,000.00 a year. He is sole owner of several corporations, the net income of one having exceeded an average of $50,000.00 for five years or more.

In November 1952, some four months after defendant's divorce and remarriage in Nevada, plaintiff, unable to get personal jurisdiction of the defendant who then lived in Nevada, commenced an action in Vermont for the custody of Penelope, under a Vermont statute which read:

> "When parents of minor children are living separately, on petition of either parent, the county court may make such decree concerning the care, custody and maintenance and education of the children, as in cases where the court grants a divorce. Thereafter, on the petition of either of the parents, such court may annul, vary or modify such decrees."—V.S. 47 3253.

Defendant filed a Special Appearance and then waived the same, filing an answer setting up his Reno divorce and his residence in Nevada.

Plaintiff filed a replication denying the validity of the Nevada divorce and requesting alimony for herself and support for Penelope. This action was tried in April 1953 before the Windham County Court in Vermont. A decision was not handed down until the following year and, pending decision, plaintiff sold her house in Vermont and moved to New York, as aforesaid, in August 1953. She more than completed the required one year period of residence before commencing this action in November 1954.

The Vermont trial Court granted to plaintiff support for Penelope and alimony for plaintiff. The trial court sustained defendant's contention as to the validity of his Nevada divorce and his subsequent remarriage. Custody of Penelope was granted to plaintiff.

On appeal, the Vermont Supreme Court sustained the award for support for Penelope, but held it had no jurisdiction to grant alimony to plaintiff because she was divorced at the time she brought the action. The Supreme Court's judgment was handed down some months after plaintiff had commenced action in New York.

The plaintiff's case in New York was tried before Special Term in April 1956 and a few weeks later the trial court dismissed the plaintiff's action on the ground that plaintiff "was advised through her Vermont suit" that relief of alimony was not open to her and that justice did not require that support be awarded in a New York action "in which plaintiff starts with the knowledge that she cannot prevail."

The Appellate Division, First Department, affirmed unanimously, without opinion, but granted leave to

appeal to the Court of Appeals on the grounds that questions were open which that Court should decide.

The Court of Appeals affirmed the trial court's decision on June 25, 1958, two Justices dissenting and on October 16, 1958 denied a Motion for Reargument.

Plaintiff's claim that an adverse decision would violate her Constitutional rights was raised in her amended complaint in the following allegations:—

> "A-1 Plaintiff brings her action for relief, as hereinafter alleged, by virtue of the provisions of the laws of the State of New York, among which are those of Section 1170-b of the Civil Practice Act, and further alleges that she is entitled to such relief as a person to whom is guaranteed equal protection of the laws of said State by the Fourteenth Amendment of the Constitution of the United States, and Article 1, Section 11, of the Constitution of the State of New York." [Record on Appeal, p. 24]

This issue was not specifically discussed by the trial court or the Court of Appeals in their original opinions, but the issue was before the courts, and was developed at length in the motion for reargument and supporting affidavits before the Court of Appeals which are a part of the record in this case and to which attention is specifically requested.

ARGUMENT

The decision of the Court of Appeals of the State of New York apparently overlooked, but in any event disregarded the fact that plaintiff-appellant there—petitioner here—in an amendment to her complaint, asserted that she was entitled to relief under Section 1170-b as a person to whom is guaranteed the equal

protection of the laws of the State of New York by the Fourteenth Amendment of the Constitution of the United States. (Record on Appeal, page 24).

Deprivation of petitioner's constitutional rights is the basis on which the granting of this petition is urged. Such rights are guaranteed by the Fourteenth Amendment to the Constitution of the United States and also by Section 2 of Article IV of the Constitution of the United States itself, the pertinent portions of which are set forth under Questions for Review herein.

This denial of fundamental constitutional rights was effected by the Court of Appeals of the State of New York through holding that only a certain class of persons designated "New York wives" is entitled to relief under Section 1170-b of the Civil Practice Act and not to a spouse who was at no time during the course of her marriage a "New York wife". And in further holding that "The purpose of section 1170-b was a protective one; it sought to afford a remedy to *wives here* whose property rights might be jeopardized by an ex parte divorce by their spouses. It was not intended as a substantive grant of a forum to all wives, wherever located, whose husbands had obtained ex parte divorces not including support provisions for them."

Petitioner, at the time she commenced this action, was a citizen of the United States and a citizen of the State of New York and entitled to full protection of the laws of the State of New York. Having resided in New York State more than twelve months prior to commencement of her action, had standing to bring such a suit and jurisdiction was effected by the sequestration of defendant's New York assets.

The term "New York wife", so far as Counsel for petitioner has discovered, was never used in legal or other serious writing prior to the recommendation by the Law Revision Commission to the Legislature that resulted in the enactment of Section 1170-b. (1953 Report of New York Law Revision Commission, pp. 463-480). The term appeared twice in the informal portion of the Commission's recommendation to the Legislature, and in both places the use was casual and informal and referred to the then recently decided *Estin* case:

> "The *Estin* case called attention to the injustice to a New York wife whose husband had obtained a divorce in another state in an *ex parte* proceeding. * * * (p. 467)
>
> "The Commission believes that legislation is necessary to protect a New York wife whose right to support from her husband may now be completely cut off by an ex parte foreign divorce decree in the absence of a previous New York separation decree with provision for maintenance. * * * (p. 468)"

This two-page recommendation constituted the first part of the Commission's report. The second part of the report was a study made at the direction of the Commission by Professor William Tucker, Dean of the New York University School of Law, Research Consultant. In the ten pages of scholarly discussion on the subject, which covered the law not only of New York but of various other states, not once is a wife referred to by any such designation as a "New York wife" or "Ohio wife" or "Nevada wife". She is referred to as a wife, residing in this or that place, and suing in this or that court.

The recommendation of the Commission to the Legislature was for the amendment of the Civil Practice Act by inserting a New Section to be numbered 1170-b. The text of the Section as proposed by the Commission was enacted almost word for word by the Legislature into the Statute now under discussion. The Commission did not carry the phrase "New York wife" into the title or the text of the statute it recommended, and the phrase would have died of insignificance had it not been raised in the Vanderbilt litigation. However, the failure of the Legislature to include the phrase or its expanded equivalent in the Statute is the most eloquent testimony to the fact that the Legislature did not want such a provision in the Statute, nor can it be contended that this was an oversight by the Legislature, for there had been proposed legislation which included it, which was rejected. This was pointed out by the Appellate Division, in the *Vanderbilt* case (1 A.D. 2nd 3, 11) with the following significant remarks:

> "The husband contends that the statute, apart from legislative power, and as a matter of interpretation, necessarily implies that there must have been a matrimonial domicile in New York before relief may be obtained under it. There is nothing in the language of the statute to require it. Moreover there had been proposed legislation which would have made such a requirement, but it was never adopted (Senate Introductory No. 2366, Senate Print No. 2611 (1948). There are many good reasons which may be suggested for omitting such a requirement. But that policy question is for the Legislature and not the courts to decide . . . ."

In the face of the foregoing how can any married woman be dubbed a "New York wife" for the purpose

of denying, or for that matter granting her relief provided under the clear and unambiguous Section 1170-b. She is neither a New York wife nor a Vermont wife. She is *a wife* and, more important from a constitutional standpoint, she is a citizen of the State of New York, having fulfilled the residence requirements when she brought this action.

Clearly the Court of Appeals of the State of New York by its interpretation of Section 1170-b, discriminated against petitioner and deprived her of fundamental rights guaranteed to her by the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States.

Apart from the foregoing violations of petitioner's constitutional rights, there is another compelling reason for review by this Court of the decision of the New York highest Court, namely this: the New York court interpreted Section 1170-b unwarrantably in a manner which defeats the purpose this Court had in view in its creation of the divisible divorce doctrine.

The purpose of that doctrine, the ends it was desired to effect, may be simply stated in their positive and negative aspects. A husband was enabled against the wishes of his wife to get a valid divorce by migrating to a foreign state (e.g., Nevada) and there prosecuting an ex parte action. He could then remarry without fear of the charge in any other state of adultery or bigamy.

It was not the purpose of this Court to relieve the migrating husband of his duty to support the wife he had deserted and cast off. On the contrary, this Court was careful to say from the first that the ex parte divorce did not touch, could not adjudicate, any per-

sonal rights between the parties. The most important of such rights to the deserted wife is that of support, concerning which this Court spoke specifically in the recent case of *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 (1957) as follows:

> "The Nevada divorce court was as powerless to cut off the wife's support right as it would have been to order the husband to pay alimony if the wife had brought the divorce action and he had not been subject to the divorce court's jurisdiction. Therefore, the Nevada divorce, to the extent it purported to affect the wife's right to support, was void."

After this Court's decision in *Vanderbilt* most certainly, if indeed not before, the New York Court of Appeals had to recognize that the abandoned wife's support right existed after the ex parte divorce untouched and undiminished, as of course did the husband's co-relative obligation to support. It was the plain duty of the New York court to interpret Section 1170-b of the Civil Practice Act to enforce the right of support and make the husband live up to his obligation. In short, it was the duty of the New York courts to carry out and effect the full and complete purpose and plan of the divisible-divorce doctrine, and not just that part of the doctrine which freed a migrating husband from the bonds of matrimony which, for reasons he is not called upon to justify or even to state, had become irksome to him.

Why did the Court of Appeals fail in this respect? It was not on any moral ground, as there was no suggestion in the record that plaintiff had committed any sin or fault, or that she had fallen short in her duties as a wife in any particular whatsoever. It was not

on any ground of public policy as enunciated in decisions of New York courts or in New York statutes, least of all in the statute under consideration, about which the Court of Appeals had just commented at page 349 in its *Vanderbilt* decision (1 N.Y. 2d, 342):

> "There is nothing in the statute's language to suggest that it was intended to apply only to marriages where the parties had lived together in this State as their matrimonial domicile."

What seems to have compelled the Court of Appeals to decide against plaintiff was over-emphasis, or more accurately false emphasis, on the motives that brought her to New York. She is viewed as an "emigrant wife" who journeyed to this State "to avail herself of the remedy afforded by Section 1170-b, or as an "out of state spouse" attracted to New York by the opportunity the statute opened "to take advantage of our courts," and the fear seemed to lurk that she would be one of a great number who would do likewise. Actually the evidence was, as the dissenting opinion (page 553) pointed out, that plaintiff "moved here by agreement with defendant and at his request." But *arguendo* let us assume the contrary. Suppose plaintiff's only reason for coming to New York was to seek the relief unavailable in Vermont offered by Section 1170-b. Is there anything sinister or immoral in such a move, or in such motivation for the move? We submit there is not. People may be influenced to move into different states because of various laws which they consider advantageous. Such a move does not constitute taking advantage of such laws in any improper sense, and certainly is not seeking "to take advantage of the court" whose duty it is to administer or apply such laws in cases coming before them.

In short, plaintiff's intent and motives in coming to New York are irrelevant, and inquiry into them and speculation about them is improper, fruitless and confusing. Plaintiff had the right of support from the husband who had abandoned her,—no one questions that. She certainly is not open to criticism for trying to enforce that right by any legal means available to her anywhere.

There is something quite ironic in the New York courts' urge to dub plaintiff an "emigrant wife" and regard her as some kind of menace. She is made to appear a wrong-doer instead of a sufferer from a wrong perpetrated by defendant. No spot light is put on defendant, who was the first to become itenerant or an emigrant from the established marital home in Vermont. No comment is made on his motive in going to Nevada, though it was obviously and admittedly for the something-less-than-noble purpose of getting a divorce in order to marry another woman. His motive in this migration to Nevada is, under the divisible divorce doctrine, irrelevant and of no significance whatsoever. The same should be true of all plaintiff's moves subsequent to her abandonment, and such it is submitted should be the pronouncement of this Court. Clarification of the doctrine of divisible divorce requires it.

The Court of Appeals also goes far afield, we believe, in gratuitously defining "the interest of the State" (page 548) and interpreting Section 1170-b to protect and further this assumed "interest" and to avoid a social condition considered by the court to be undesirable. In this wrongful shift of judicial concern, it is worthy of note that the Court of Appeals created a worse sociological condition than the fancied

me it was seeking to avoid. The court was concerned that New York should not become a haven for "emigrant wives" journeying to the state to avail themselves of the remedy afforded by Section 1170-b. But by its decision in this case the court has made New York a haven for emigrant husbands who seek to avoid the obligation contemplated by the divisible-divorce doctrine. If this decision stands, husbands from every other state in the union who have deserted their wives and procured easy ex parte divorces, can "journey to New York" with all their property and be forever secure against any attempt to force them to pay alimony, —forever free from any obligation to support the women they had sworn to cherish.

This is a mockery of justice. It is a distortion of this Court's concept of the doctrine of divisible divorce. It is a complete negation and defeat of the sacred support right of innocent and virtuous wives which this Court sought to make secure.

Common sense and elemental justice require that this Court review and reverse the decision of the New York Court of Appeals, and interpret Section 1170-b to buttress and effect the purposes of the divisible-divorce doctrine, not to defeat them.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue as above requested.

Respectfully submitted,

Dated: January 13, 1959

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